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No. 06-1221

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In The

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1) Does Rule 401 of the Federal Rules of Evidence bar all evidence of other-supervisor discrimination or actions in an employment discrimination case?

(2) Does Rule 403 of the Federal Rules of Evidence invariably require, or in all cases authorize, the exclusion of evidence of other-supervisor discrimination or actions?

(3) Did the court of appeals err in holding that petitioner's in limine motion should have been denied?

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STATEMENT

For sixteen years Ellen Mendelsohn was employed as a mid-level manager for Sprint; in 2002 she was working at Sprint's headquarters campus in Overland Park, a suburb of Kansas City, Missouri. On November 22, 2002, Mendelsohn was laid off as part of a reduction in force ("RIF"). That RIF was among several phases of a centrally-directed, continuous reduction-in-force at Sprint, extending from October 2001 through March 2003, resulting in more than 14,000 terminations.[1] The number of jobs eliminated in each of Sprint's subsidiary business units, and the dates on which each RIF action was to occur, were determined at the highest management level at Sprint. The selection of the particular individuals to be laid off was overseen by the company's Human Resources Department, under enterprise-wide reduction-in-force rules and guidelines.

Mendelsohn brought suit in 2003, alleging she had been laid off because of her age, in violation of the Age Discrimination in Employment Act. Her complaint contained several allegations that Sprint had a "pattern and practice" of discrimination.[2]

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[1] The RIF is described in *Williams v. Sprint / United Management Co.*, 222 F.R.D. 483 (D.Kan. 2004).

[2] JA 11a ¶ 19("Plaintiff has observed a pattern and practice of Sprint laying off, and not finding jobs for, well-performing employees in their late 40's, early 50's, and older. Instead, Sprint has separated or demoted employees in the protected age group, whereas for younger employees Sprint finds alternative jobs if the current jobs of younger employees are restructured or

The In Limine Motion and Order

Before trial, Sprint filed a motion in limine to exclude much of the evidence Mendelsohn proposed to offer. The defendant asked the district court to bar

> [p]laintiff, her counsel, and her witnesses from directly or indirectly introducing evidence, argument or other reference, in the presence of the jury, . . . [of] Sprint having a "pattern and practice" of age discrimination, a culture of age discrimination, a history of age discrimination, or any similar broad allegation of age discrimination . . . . and/or any reference to specific allegations of discrimination against Sprint employees not similarly situated to Plaintiff.[3]

Sprint argued that "[e]mployees may be similarly situated," and evidence about them admissible, "only if they had the same supervisor, and the decisions regarding their employment were made by the same decisionmakers." (JA 163a). The motion also asked the court to preclude plaintiff from offering evidence that made "[a]ny reference to age-derogatory remarks by any Sprint employee." (JA 157a, ¶ 5).

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eliminated."), 11a ¶ 22 ("Defendant Sprint, by and through its officers, employees and agents, engaged in a continuing pattern and practice of discrimination . . ."), 12a ¶ 23 ("As a direct and proximate result of defendant's continuing pattern and practice of discrimination . . . plaintiff suffered actual damages . . . .").

[3]JA 155a ¶1.

The district court granted the motion, forbidding plaintiff from offering any

> evidence that Sprint has a pattern and practice, culture or history of age discrimination . . . and [of] discrimination against employees not similarly situated to plaintiff. . . . Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for the purpose of this ruling, requires proof that (1) Paul R[e]ddick was the decision-maker in any adverse employment action; and (2) temporal proximity.

(Pet. App. 24a). The order also barred evidence of biased remarks by any company official other than Reddick. (*Id.*). The district court apparently accepted Sprint's argument that exclusion of any evidence of discrimination by supervisors other than Reddick was required as a matter of law by specific Tenth Circuit precedent. (Pet. App. 2a-3a, 14a-15a n. 3).

The blanket exclusionary order severely limited Mendelsohn's ability to prove her claim. There were *no* Sprint employees who met the court's narrow definition of "similarly situated"; Sprint claimed that Reddick had laid off only two workers, and Mendelsohn was the only one over 40. (Tr. 267). The order preordained that plaintiff was unable at trial to call a single non-hostile live witness to support her allegation of discrimination. Aside from Ms. Mendelsohn, the only witnesses plaintiff's attorney was able to call were current Sprint officials and employees who testified as hostile witnesses. Because

of the limiting effect of the order on plaintiff's sources of proof, defendant found it unnecessary to call any defense witnesses, and rested immediately after plaintiff. (Tr. 1323).

The Proffered Evidence

Before the close of plaintiff's evidence, Mendelsohn made an offer of proof.[4] Mendelsohn referred the court to the depositions of five witnesses[5]. Plaintiff also provided the district court with a written summary of the testimony at issue and proffered one documentary exhibit. (JA 342a-351a).

One proffered witness would have offered key testimony about the overall impact of the Sprint layoffs. At least twice a week for a year the witness had visited the out-placement center established by Sprint. He reported that the "vast majority" of the laid off workers at the center were over 40.[6] Another witness, a former supervisor, would have testified that the pattern of Sprint layoffs was that

> a younger work force had been maintained while an older work force was not. . . . [B]ased on the people that I know that have been RIF'd

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[4] The district judge directed counsel for Mendelsohn to make the offer of proof in this form.

[5] Bonnie Hoopes, John Hoopes, Yvonne Wood, Sharon Miller and John Borel. Their depositions had earlier been made part of the record.

[6] JA 349a; J. Hoopes Dep. 43-44, 53-54.

> . . . the majority of those people being older people.

(Miller Dep. 113.)[7] The order barred Mendelsohn herself from repeating at trial her similar testimony regarding her observations on the pattern of layoffs at Sprint.[8]

It was widely known, according to one witness, that a Sprint Vice President had made comments about the need for "a faster, more vital group of people." There was "pretty much a general understanding throughout the organization" that the Vice President "wanted younger employees."[9] "[I]t was a pervasive understanding in the corporation" that the official's "comments [that] . . those who wouldn't or couldn't keep up would be gone had to do with individual's ages."[10] According to the proffered testimony, there was "a set of expectations of how people are to operate at the management level," and with regard to "how the

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[7] The witness arrived at her conclusion that there was widespread age discrimination

> [b]ased on the number of people that I've seen since the RIF that are long-term employees, older employees that have been RIF'd and knowing that there are positions in Sprint that are being filled by younger employees just from observation.

(Miller Dep. 109).

[8] Mendelsohn Dep. 92-93.

[9] Miller Dep. 73.

[10] Miller Dep. 76.

RIF was [to be] conducted" the expectation was that there would be layoffs "because of people's ages."[11]

Another witness described having been inadvertently sent a RIF spreadsheet, intended only for higher management, that would systematically spell out the ages of workers who were to lose their jobs. The witness was emphatically told to destroy her copy of the document, which she interpreted as a tool to facilitate age discrimination. The spreadsheet had been prepared by one official at the request of a second official to be circulated to yet another company manager.[12] The witness had complained in vain about the document to a Sprint Director; a Sprint Vice President, and the company Human Resources Department.[13]

Each of the five proffered witnesses, all of whom were over forty, would have testified to facts supporting an inference that he/she had been laid off because of age. All of those witnesses were working for Sprint in the Kansas City area, several of them at the same Overland Park office complex as Mendelsohn. Four of the five, like Mendelsohn, had been in Sprint's PCS (wireless) Division. One of the five[14] was laid off on November 22, 2002, the same day as Mendelsohn,

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[11] Miller Dep. 119.

[12] JA 344a-45a; Wood Dep. 48-51, 77-78.

[13] Wood Dep. 91, 92, 95, 98.

[14] Bonnie Hoopes (Bonnie Hoopes Dep. 49).

another was laid off the day before[15], and several others lost their jobs within three months of Mendelsohn's dismissal.[16] The observations and experiences of these individuals were particularly significant because the assertedly pretextual methods used to discriminate against these witnesses were similar to the methods by which Mendelsohn claimed to have been discriminated against.[17]

Two witnesses described being pressed not to hire workers because of the prospective employee's age.

> Q. I believe you indicated that Ted Stock [Director] didn't want to hire Chuck Jones; is that right?
> A. That's correct.
> Q. And I think you indicated that it was because he wanted someone younger; is that right?
> A. That was the comment that he made. . . . [Stock] expressed the concern of can't we find someone who's younger and just more qualified or just as qualified or some -- can we take a look at some other younger candidates.

(Miller Dep. 53). The other witness described being required to get "vice president approval" to hire any

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[15] Sharon Miller (JA 345a; Miller Dep. 87).

[16] Yvonne Wood (January 14, 2003; Wood Dep. 41); John Borel (Feb. 26, 2003; Borel Dep. 33, 38).

[17] See pp. 46-49, *infra*.

new worker who was over 40,[18] and being pressed to justify hiring a 48 year old worker rather than looking instead for a younger recent college graduate.[19]

Several witnesses would have testified that other statements of bias against older workers were made repeatedly and openly by Sprint officials. One witness described hearing such remarks "frequently," "at least a couple of times a month."[20]

> [A]n example would be [a Director's] comment that he felt he had too many older people and ailing people, old, sick people in his department. . . . He frequently made references about his concerns about a couple of other employees . . . who were older and made comments about waiting for layoffs to [occur] so that he could clean up his department.[21]

That official's biased remarks were repeated in the presence of other senior managers.[22] The witness had complained in vain about the remarks to a Sprint Vice

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[18] J. Hoopes Dep. 57; JA 123a; 348a.

[19] J. Hoopes Dep. 60-61.

[20] Miller Dep. 31, 32, 59.

[21] Miller Dep. 26-27.

[22] Miller Dep. 33, 38-40.

President[23] and to other officials.[24] Bonnie Hoopes, who was fired the same day as plaintiff, had been told by her supervisor "that I was too old for the job."[25] Ms. Hoopes had received a memorandum (excluded under the in limine order), circulated by her supervisor, that quoted with approval a book which described the most desirable employees as those who were "blessed with lots of runway ahead of them."[26] That memo was circulated to at least four Sprint officials, and was expressly intended to assure that the recipients had a written copy of that admonition, which had been quoted at an earlier meeting of Sprint officials.[27]

The in limine order precluded the plaintiff from offering inculpatory evidence or arguments regarding actions of supervisors other than Reddick; the order did not, however, forbid Sprint from offering *exculpatory* evidence or arguments based on conduct by other supervisors. Although the plaintiff was forbidden to offer evidence of biased remarks by

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[23] [The Vice President] kind of sluffed it off to an extent as far as I could tell. I think she was protective of him. I think her comment was, "I think you must have misunderstood him" or "he was under pressure" . . . .

Miller Dep. 38.

[24] Miller Dep. 33.

[25] JA 344a; Bonnie Hoopes Dep. 93, 95.

[26] JA 350a.

[27] JA 350a.

supervisors other than Reddick, Sprint was permitted to--and did--offer evidence suggesting that other supervisors never made such remarks. The defendant designated just such exculpatory testimony from a deposition that was read to the jury:

> Q. And the next category is age biased comments by defendant's management toward older employees. Did you know anything about that?
> A. No. I never saw that.

(Browne Dep. 31-32; see Tr. 330-31). Plaintiff was expressly barred from responding to this by introducing evidence to the contrary.

The district court also permitted Sprint to substantiate the need to lay off Mendelsohn by offering evidence the RIF had encompassed the entire PCS Division in which Mendelsohn worked, with "close to 500" other people laid off from that Division during that RIF.[28] Almost all of those 500 laid off workers

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[28] At trial one of plaintiff's central arguments was that, although she had been told she lost her job due to a reduction in force, the size of her particular unit--the Mobile Financial Services unit--had actually increased after she left. (Tr. 116). As to that unit, what actually occurred in late November 2002 was that the oldest worker was laid off, and then the unit as a whole expanded by two. If that was all the jury knew about the events of the fall of 2002, it might have regarded Reddick's explanation with considerable skepticism. Thus it was very important for Sprint to be able to show that there were actually net reductions in employment--made by supervisors other than Reddick--in the

(like plaintiff's excluded witnesses) had not been chosen by Reddick. Those 500 laid-off PCS workers referred to in this exculpatory testimony included four of the five over-40 workers whom plaintiff had been forbidden to call as witnesses.[29] The trial judge explained that "the jury needs to have a fair understanding of what's involved in the entire process." (Tr. 230-31). Under the in limine order, however, that "fair understanding" did not include disclosure to the jury that several employees among that larger PCS group had harrowing stories to tell about age discrimination and biased remarks in PCS.

In closing argument, counsel for Sprint took full (if not excessive) advantage of the exculpatory deposition testimony that it had read into the record:

> [A]n ex-employee who is disgruntled and a friend of the plaintiff, Ellen Mendelsohn, told you very clearly in his deposition testimony he never saw any evidence of age discrimination at Sprint.

(Tr. 1346). Taking full advantage of the fact that plaintiff had been forbidden to offer any evidence of discrimination or biased remarks by Sprint officials other than Reddick, counsel for the defendant argued:

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wider PCS unit of which the Business Development & Strategy Group was a part.

[29] Bonnie Hoopes, Yvonne Wood, John Borel and Sharon Miller.

> We've had six days of evidence. We've been through binders and binders of documents and there is not an iota of evidence of age discrimination here.

(Tr. 1346).

SUMMARY OF ARGUMENT

The district court's blanket exclusionary order improperly prohibited introduction of four broad categories of evidence: (1) evidence of a pattern and/or practice of age discrimination, (2) evidence of a culture or history of discrimination, (3) evidence of age-biased remarks by any Sprint official except the particular supervisor who assertedly selected Mendelsohn for layoff, and (4) any other evidence of other-supervisor discrimination that might support Mendelsohn's age discrimination claim. In appropriate circumstances, each of these types of other-supervisor evidence can easily satisfy the relevance standard in Federal Rule of Evidence 401.

Rule 401 requires only that proffered evidence have "any tendency to make the existence of any fact that is of consequence . . . more or less probable." Evidence is relevant under Rule 401 if an individual who genuinely needed to know the merits of a claim or defense might reasonably want to have the information in question. That standard is met if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." 2 *Weinstein's Federal Evidence* § 401.04[2][c][ii].

Two types of pattern and/or practice evidence are relevant to an employment discrimination case. First, evidence suggesting the existence of a pattern of discrimination at the employer, or in the relevant business unit, is "competent evidence." *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973). Statistics are one, but not the sole, example of such evidence. Second, evidence of a pattern and/or practice of discrimination may in some cases be so compelling as to suffice by itself to meet the plaintiff's burden of proof, and shift the burden of proof to the defendant. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The evidence relied on by the Court in finding such a pattern and/or practice in *Teamsters* included 40 specific instances of discrimination, precisely the type of evidence that Sprint insists should be deemed inadmissible "me,too" evidence. 431 U.S. at 338.

The existence of a culture of discrimination is relevant because it tends to explain why a particular supervisor might have engaged in discrimination. *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003)("culture of discrimination" in Dallas County Prosecutor's office). Discriminatory actions and statements by superiors or peers can create a "discriminatory atmosphere in which individuals could justify their bias." *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995).

Discriminatory remarks by other supervisors can also be a telling indicator of the environment at a plant or office. A supervisor who makes such a remark to one or more company witnesses manifestly believes that he or she will not be disciplined for that statement. A reasonable jury could infer that such a

supervisor had correctly discerned that company officials regarded such discrimination with tolerance or even approval. That is particularly true where, as here, the remarks were made by an official with "authority to render personnel decisions." *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 133 (3d Cir. 1997).

Acts of discrimination by other supervisors may also bear directly on a claim that the employer's proffered reason for the disputed adverse action was merely a pretext for discrimination.

The use of other-supervisor evidence is not limited to plaintiffs. Defendants can and often do rely on exculpatory other-supervisor evidence. *E.g., Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

In determining the admissibility of evidence, the trial judge need not personally find the evidence probative. The proper inquiry is instead whether "a reasonable person acting as trier [of fact] could assign some weight to the evidence." 1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:1.

Rule 403 does not always require or authorize the exclusion of other-supervisor evidence. The problems with which Rule 403 is concerned will not invariably be present, and can usually be dealt with by an appropriate jury instruction. In administering Rule 403, courts should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Weinstein's Evidence* ¶ 403(3). Evidence may be excluded only when its

"probative value is substantially outweighed" by one of the Rule 403 factors. The Tenth Circuit properly held that standard was not met, and the blanket exclusionary order could not stand.

ARGUMENT

I. RULE 401 OF THE FEDERAL RULES OF EVIDENCE PERMITS THE USE OF OTHER-SUPERVISOR EVIDENCE IN AN EMPLOYMENT DISCRIMINATION CASE

The blanket exclusionary order barred completely any testimony or documentary evidence regarding discriminatory actions or statements by any Sprint official other than Paul Reddick. Under Rule 401 such other-supervisor[30] evidence is relevant if it has

> *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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[30] As the United States notes, the in limine order was not limited to testimony that there had been acts of discrimination against the proffered witnesses themselves. (U.S. Br. 13 and n. 1). The government accurately characterizes the in limine order, and the subject matter of instant appeal, as more broadly concerning other-supervisor evidence.

Fed. R. Ev. 401 (emphasis added).[31] That standard is met if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." 2 *Weinstein's Federal Evidence* § 401.04[2][c][ii], at 401-25 (Joseph M. McLaughlin ed., 2d ed. 2007). In common sense terms, evidence is relevant under Rule 401 if an individual who genuinely needed to know the merits of a claim or defense might reasonably want to have the information in question.

"Rule 401 sets a purposely low gateway threshold for the introduction of evidence." (U.S. Br. 14). "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); *Huddleston v. United States*, 485 U.S. 681, 691 (1988). "Sometimes . . . the proof is fragmented and consists of many facts. Alone, each has little or no probative force, but the whole (the conjunction of all the facts) may almost impel a conclusion." 1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:2 at 557 (3d ed. 2003).

To meet the requirement of Rule 401, a piece of evidence need not be sufficient by itself to support a finding for the proponent of the evidence on an issue of consequence. Most evidence is not conclusive, because it is almost always possible to imagine circumstances,

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[31] A "fact of consequence" may be "ultimate, intermediate or evidentiary . . . so long as it is of consequence to the determination of the action." Advisory Committee Notes.

sometimes plausible ones, which if present would dispel the probative value of the evidence. The possibility that those circumstances actually existed, however, impacts only the persuasiveness of the evidence, not its admissibility; "flaws affect weight, not relevance." 2 *Weinstein's Federal Evidence* § 401.06, at 401-42.1.

> [T]he common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. . . . That more than one inference could be drawn is not enough to render the evidence irrelevant.

J. W. Strong, *McCormick on Evidence*, 278 (5th ed. 1999).

> [E]ven in the cases of shaky evidence, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" such evidence, not exclusion.

Robinson v. Runyon, 149 F. 3d 507, 515 (6th Cir. 1998)(*quoting Doe v. Claiborne County, Tennessee*, 103 F. 3d 495, 515 (6th Cir. 1996)(*quoting Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993))).

There is a "judicial inhospitability to blanket evidentiary exclusions in discrimination cases." *Quinn v. Consolidated Freightways Corp. v. Delaware*, 283 F.

3d 572, 578 (3d Cir. 2002). The trial court's blanket exclusionary order barred all other-supervisor evidence, including evidence of "a pattern and practice . . . of discrimination," evidence of a "culture or history of discrimination," evidence of specific instances of other-supervisor evidence, and evidence of biased remarks by any Sprint official or manager other than Reddick. The district judge concluded that Tenth Circuit precedent always mandated this sweeping exclusion of other-supervisor evidence.

The district court erred in holding that each of these broad categories of evidence is invariably irrelevant under Rule 401.

A. Rule 401 Permits Use of Evidence of A Pattern And/Or Practice of Discrimination

The district court erred in barring all evidence of a pattern and/or practice of discrimination.[32] Both this

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[32] The court of appeals held, in part, that the in limine order was improper because it barred the plaintiff from offering evidence of a pattern and/or practice of discrimination. (Pet. App. 6a-10a).

In the court of appeals, Sprint asserted that the plaintiff had somehow waived her contention that there was a pattern and/or practice of discrimination in this case. Brief for Appellee, No. 05-3510, p. 13. The court of appeals concluded that the dispute about pattern and/or practice evidence was properly before it, and devoted much of its opinion to resolving that question. (Pet. App. 6a-10a and n. 2).

Petitioner did not seek review in this Court of the Tenth Circuit's fact-bound determination that respondent had adequately preserved this issue. In its merits brief, however,

Court and the lower courts have long and quite properly relied on evidence of a pattern and/or practice of discrimination in determining whether an individual was the victim of intentional discrimination.[33]

The language used by the courts in referring to this type of proof has varied; the decisions of this Court[34] and the lower courts[35], without any evident difference

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petitioner asserts (as it did without success in the court below) that the plaintiff somehow waived her right to offer pattern and/or practice evidence. (Pet. Br. 3, 33). That issue is not within the scope of the Question Presented.

[33] In its closing argument, Sprint insisted that the absence of any evidence of a pattern of discrimination was quite significant:

> Where is the evidence of age discrimination in this case? . . . [Counsel for plaintiff] keeps telling you no one admits that they made a decision based on age . . . . Well maybe that's true in most cases, but you know what? There's usually some evidence of it . . . [T]here's usually some sort of pattern to those actions that tends to show age discrimination.

(Tr. 1345).

[34] For example, in *Teamsters* this Court variously characterized the evidence in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), as having established a "pattern *and* practice," a "pattern *or* practice," a "pattern" and a "policy" of discrimination. 431 U.S. at 359-63 and nn. 45-46 (emphasis added).

[35] In the court of appeals several such phrases are used interchangeably. Pet. App. 6a ("general policy and practice," "a

in meaning have referred interchangeably to a "pattern and practice," a "pattern or practice," or simply a "pattern" or a "practice." In some cases, such as *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), this Court and the lower courts use the phrase pattern and/or practice to refer to a category of evidence that is probative of discrimination. In other cases, such as *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the courts use this phrase differently, to refer to evidence so persuasive that it establishes a presumption that discrimination occurred against the plaintiff, a class, or (in a case brought by the government) asserted victims.

Mendelsohn's proffered pattern evidence is more aptly analyzed under the *McDonnell Douglas* framework. The district court's order, however, clearly would bar *all* such evidence.

Teamsters Pattern and/or Practice

In *Teamsters* this Court held that the proof that established a pattern and/or practice of widespread discrimination was sufficient by itself to require (absent rebuttal) a finding of discrimination as to each unsuccessful minority applicant:

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pattern of dismissal based on age"), 6a n. 2 ("pattern and practice").

In its in limine motion, petitioner used the phrase "pattern and practice." (JA 155). In its brief in this Court, petitioner uses the phrase "pattern or practice." (Pet. Br. 3, 33).

> The proof of the pattern or practice supports an inference that any particular employment decision [was discriminatory]. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination.

431 U.S. at 362. In holding that the unusually compelling pattern and/or practice[36] evidence in *Teamsters* had created a presumption that discrimination had occurred against each of the alleged individual victims, this Court necessarily found such evidence was relevant to those individual claims. In private class actions, the phrase pattern and/or practice is often used to denote, as in *Teamsters*, evidence which shifts that burden to the defendant. *Cooper v. Federal Reserve Board*, 467 U.S. 867, 876 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

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[36] *Teamsters* described the evidence of discrimination sufficient to shift the burden of proof in various terms, such as "more than . . . isolated," 431 U.S. at 336 (a less demanding standard); "regular," 431 U.S. at 359-60 (a seemingly intermediate standard); and as "standard operating procedure," 431 U.S. at 336 (a more demanding standard). The evidence of discrimination relied on by the United States concerned only ten of the company's fifty-one terminals. *United States v. T.I.M.E.-D.C., Inc.*, 517 F. 2d 299, 304 (5th Cir. 1975). The quantum of evidence sufficient to establish a *Teamsters* pattern and/or practice is affected by the fact that the defendant has the best access to proof. 431 U.S. at 359 n. 45. The resolution of the instant case does not require clarification of this standard.

In establishing the pattern and/or practice in the *Teamsters* sense, the United States relied both on statistics and on "testimony of individuals who recounted over 40 specific instances of discrimination." 431 U.S. at 338. This is precisely the type of anecdotal evidence barred by the blanket exclusionary order here, and the "specific instances" relied on by this Court in *Teamsters* are what Sprint dismissively insists are inadmissible "me, too" evidence. In finding that there was a pattern and/or practice of discrimination, the trial court in *Teamsters* had expressly credited these government witnesses. 431 U.S. at 338. This Court approved the use of such evidence to support a finding of pattern and/or practice and noted that, although statistics were often used to help prove the existence of a pattern and/or practice, such a pattern might be demonstrated solely "by examining the discrete decisions of which it is composed." 431 U.S. at 360 n. 46.

Teamsters involved a quintessential use of other-supervisor evidence. The evidence relied on to establish the presumption of discrimination against each individual alleged discriminatee necessarily rested largely on evidence of discrimination against persons other than that particular claimant. The statistical evidence in *Teamsters* revealed a pattern of company-wide discrimination by T.I.M.E.-D.C., Inc., a pattern that encompassed thousands of employees at ten terminals in as many states.[37] As to any specific claimant relying on the proven pattern and/or practice,

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[37] *United States v. T.I.M.E.-D.C., Inc.*, 517 F. 2d 299, 304 (5th Cir. 1975).

most of that statistical and anecdotal evidence would have summarized actions taken by other supervisors. The finding of a pattern and/or practice in *Teamsters* was based in part on evidence about acts of discrimination against forty specific minority drivers; the presumption created by that evidence, however, extended to all of the hundreds of minority drivers encompassed by the litigation. See 431 U.S. at 337.

McDonnell Douglas Pattern and/or Practice Evidence

This Court and the lower courts have also used the phrase pattern and/or practice to refer to evidence which is clearly not as compelling as the evidence in *Teamsters*.[38] *McDonnell Douglas v. Green*, supra, decided "the order and allocation of proof in a private, non-class action." 411 U.S. at 800. This Court held with regard to Green's individual hiring claim:

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[38] As the United States correctly observes,

> [i]n order to be relevant . . . a pattern of discrimination against members of a protected group need not be so widespread and systematic as to support an inference that discrimination is the employer's standard operating procedure and that each individual denied an employment opportunity who is a member of the group is more likely than not a victim of discrimination. Like other circumstantial evidence, a pattern of discrimination is relevant if it makes it more probable that the plaintiff is a victim of discrimination, even if the increase in probability is not great.

U.S. Br. 19.

> [E]vidence that may be relevant to any showing of pretext includes facts as to . . . petitioner's general . . . practice with respect to minority employment.

411 U.S. at 804-05 (footnote omitted). The Tenth Circuit expressly relied on this Court's holding. (Pet. App. 6a)(*quoting McDonnell Douglas*). *McDonnell Douglas* explained:

> [findings] that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices, . . . while helpful, may not be in and of themselves controlling as to an individualized hiring decision.

411 U.S. at 805 n. 19.[39] Such proof, although not shifting the burden of proof to the defendant as in *Teamsters*, was still "relevant" and "competent

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[39] Similarly, in *Miller-El v. Dretke*, 537 U.S. 322 (2003), in finding that a certificate of appealability should have been issued, the Court relied in part on evidence that even prior to the jury selection in that case there was a pattern of exclusion of African-Americans from jury service. 537 U.S. at 331, 346. This pre-existing pattern (like the evidence described in *McDonnell Douglas*) was deemed to provide support to Miller-El's claim of discrimination in his own case. The exclusion of African-Americans from prior juries was largely the result of the exercise of peremptory challenges by Dallas County prosecutors other than the two attorneys in the *Miller-El* case itself; it was other-prosecutor evidence.

evidence," 411 U.S. at 804-05, in a "private, non-class action," such as Mendelsohn's.

The type of evidence referred to by the Court in *McDonnell Douglas* — regarding workforce "composition," "general" practice, and statistics — necessarily was evidence about how minority employees or applicants other than Green himself had been treated by the employer. Considering the size of McDonnell Douglas, virtually all of the actions thus depicted or summarized would have been taken by supervisors other than the particular official who decided not to re-hire Mr. Green.

Pattern and/or practice evidence that is probative proof under *McDonnell Douglas* is in some instances different than the type of evidence relied on in *Teamsters*. *Teamsters* pattern and/or practice evidence, like proof of a pattern and/or practice in a class action, refers to pattern and/or practice evidence regarding the specific kind of discriminatory practice alleged, e.g. a pattern and/or practice of discrimination in layoffs. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). *McDonnell Douglas* pattern and/or practice evidence, on the other hand, need only involve the same type of discriminatory purpose, e.g. age or race or gender discrimination to be relevant to "any showing" of pretext. Thus in *McDonnell Douglas*, although the plaintiff alleged racial discrimination in the recall of a furloughed worker, the Court held that discrimination in the company's overall work force composition--largely the result of discrimination in hiring--would be probative evidence. 411 U.S. at 804-05. In other instances, *McDonnell Douglas* proof may be similar in kind to the

evidence in *Teamsters*, but less compelling. For example, the other examples of discrimination relied on might not be as numerous as the forty instances in *Teamsters*, or statistical evidence might not be used, or might control for fewer variables. Those differences at times will often be the result of the discovery and litigation cost involved; the sort of elaborate presentation made by the Department of Justice in *Teamsters* would be far beyond the means of an individual plaintiff such as Ellen Mendelsohn.

This Court has endorsed the universal lower court practice of permitting plaintiffs (and defendants) to rely on statistical evidence to support (or oppose) a claim of intentional discrimination:

> Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

Teamsters, 431 U.S. at 340 n. 20 (*quoting United States v. Ironworkers Local 86*, 433 F. 2d 544, 551 (9th Cir. 1971)).

Statistics, of course, are not the only permissible method of demonstrating a pattern of action by an employer. Here, for example, such a pattern was depicted (albeit without mathematical precision) by the proffered evidence that the "vast majority" of former Sprint workers seeking out-placement were over forty. (JA 349a). At least where a meaningful

pattern can be established in that way[40], individual plaintiffs are not required to incur the possibly prohibitive cost of retaining a statistical expert and conducting a multi-factor computer analysis. While possibly "helpful," statistics are not required. *McDonnell Douglas*, supra, 411 U.S. at 805.

This Court has made clear that defendants too may rely on other-supervisor evidence when it is exculpatory in nature. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court explained:

> the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that its work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent.

438 U.S. at 580. The probative value of such exculpatory other-supervisor evidence was for the trier of fact. *Id.* In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), following an EEOC action in which the lower courts determined the defendant had *not* engaged in a system-wide pattern and practice of discrimination, several individual former class members brought suit. In holding that those individual claims could proceed, this Court,

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[40] *See, e.g. Koster v. Trans World Airlines, Inc.*, 181 F. 3d 24, 33 (1st Cir. 1999); *Ryther v. KARE 11*, 108 F. 3d 832, 842 (8th Cir. 1997)(en banc); *Greene v. Safeway Stores, Inc.*, 98 F. 3d 554, 560-61 (10th Cir. 1996); *Bingman v. Natkin & Co.*, 937 F. 2d 553, 556 (10th Cir. 1991).

citing *McDonnell Douglas*, explained that "the determination in the [earlier class] action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext." 467 U.S. at 880. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513-14 (1993), the Court held that "[t]he disproportionately [large] minority makeup of [a] company's work force" could be relied on as exculpatory evidence.

All of these decisions, petitioner now suggests, were wrong. Regardless of the extent of discrimination on the part of the other supervisors in *Teamsters* or *McDonnell Douglas*, and regardless of how exemplary the other supervisors were in *Furnco* or *Cooper*, Sprint contends that their actions were "substantively irrelevant" to the claims of any individual plaintiffs or claimants in those cases, because there was no "link" or "nexus" between the actions of those supervisors and the actions of the particular supervisor that affected each specific plaintiff. (Pet. Br. 9). Rule 401, petitioner insists, forbids the use of statistical evidence except where it is based on and "drawn from persons affected by the same supervisor decisionmaker." (Pet. Br. 27 n. 9.) Where, as would frequently be the case, the particular supervisor in question personally had made too few decisions to permit any statistical analysis, there would be no statistical evidence with the requisite link to the disputed employment action.

Rule 401 assuredly does not bar the use of all this evidence. In employment cases "the relevance of statistics in general is indisputable." 2 *Weinstein's Federal Evidence*, § 401.08[11] at 401-74. The link among the supervisors at issue in *Teamsters* and in

McDonnell Douglas is the same link that exists among the Sprint supervisors in the instant case--at the relevant time they all worked for the same employer. Fellow supervisors employed by the same organization are not unrelated strangers who, like the pilgrims in Chaucer's *Canterbury Tales*, happen by some stroke of fate to find themselves housed in the same office building or complex. To the contrary, fellow supervisors typically have for years worked under the same leadership, been guided by and interpreted the same memos, e-mails, speeches and comments from the same managers, had access to the same computer files, attended the same or similar meetings[41], and talked in overlapping circles at the same lunches or around the same water coolers. That is why a reasonable trier of fact in the instant case could care about age discrimination by other Sprint supervisors in the 2001-03 RIF, but not about age discrimination by supervisors at AT&T or Deustche Telekom.

Sprint argues that other instances of discrimination are not probative because its process for making layoffs was "decentralized." (Pet. Br. 34). There might, of course, be employers whose officials are so scattered and so isolated from one another that no reasonable inferences could be drawn about one

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[41] See Tr. 764; 1100 (describing key "leadership meeting" attended by Reddick and other supervisors).

from the actions of another.[42] In this case, however, the supervisors in question worked near one another, and there was substantial evidence that the RIF process was highly centralized and coordinated from the top.[43] Sprint would, of course, be free on remand to seek to persuade the jury the Sprint supervisors who worked a few hundred yards from each other in Sprint's Overland Park office complex were so unconnected — but Rule 401 does not presume that to be true.

Petitioner suggests the only circumstance in which evidence of a pattern and/or practice of discrimination would be relevant is if plaintiff could first show both (a) that there had been an overt "expression of ageist attitudes by senior management" (Pet. Br. 31)[44] and (b) the declaration of discriminatory policy had in fact affected both the plaintiff's own supervisor and the other supervisors in question. (Pet. Br. 32-33). But no

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[42] The distances among the supervisors would not necessarily preclude use of other-supervisor evidence. In *Teamsters* the proven pattern and practice involved actions by supervisors at ten terminals in as many states.

[43] *E.g.*, Tr. 74-76; 103-04; 135-37; 218-20; 227-31; 236-49; 267-72; 965-73; 1037-39.

[44] By "senior management" Sprint evidently means only the President or CEO of a company. (Pet. Br. 32 n. 12.) Elsewhere petitioner dismisses as legally irrelevant statements of a discriminatory policy made by a company's general counsel, "managers," "senior staff," or "human resources official[s]." (Pet. Br. 26 n. 7.)

such extraordinary inculpatory evidence was present in *Teamsters* or required by *McDonnell Douglas*.

The prohibition against age discrimination contained in the ADEA is not limited to employers whose CEOs are so incredibly inept as to make openly biased statements (in front of individuals not loyal enough to keep them secret) and then leave an evidentiary trail connecting those remarks to particular employment decisions.[45] The touchstone of relevance under Rule 401 is whether a reasonable person who wanted to determine if discrimination had occurred might want to know the information in question. A reasonable trier of fact assuredly would want to know if there was evidence suggesting a pattern and/or practice of discrimination at Sprint, regardless of whether there was also evidence that the company's CEO had expressly and personally inspired the discrimination involved.

Petitioner suggests that the possible occurrence of some instances of age discrimination at Sprint is "hardly surprising" and thus that evidence of such discrimination is not probative. (Pet. Br. 36).[46]

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[45] *Riordan v. Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987)("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it.")

[46] In the district court petitioner argued that evidence from five witnesses (or indeed any witnesses) regarding other acts of discrimination would be impermissible under Rule 403 because it would consume too much time. In this Court, petitioner now reverses course and argues that the proffered evidence was

Certainly in employment, as in matters of state, it may be that "stuff happens" which is not indicative of any wider problem.[47] But whether in this or any other case the occurrence of some instances of age discrimination

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irrelevant under Rule 401 because plaintiff proposed to call *too few* witnesses regarding other acts of discrimination. (Pet. Br. 8, 33, 36).

Such new objections to admissibility cannot ordinarily be raised in the first instance on appeal. The Federal Rules of Evidence require that a district judge explain the reasons for any in limine order, in order to afford the party adversely affected an opportunity to adduce evidence that addresses the court's concerns. That opportunity is denied when a new ground is advanced on appeal for excluding disputed evidence.

Sprint's about face on how many other-supervisor witnesses plaintiff was required to call is understandable. When Sprint was arguing in December 2004 that 5 such witnesses were too many, over 2,000 of Mendelsohn's former co-employees were alleging a pattern or practice of discrimination permeated Sprint's 2001-03 layoffs. Had Sprint then claimed — as it does now — that more anecdotal witnesses were necessary to establish the relevance of their testimony, Mendelsohn could have summoned them from down the hall.

[47] The fact that a single Federal Express driver once got a speeding ticket would not tend to show that a different Federal Express driver was speeding at the time of a disputed accident; at some point in their lives many individuals may commit such an infraction. On the other hand, if an Enron official at one generating station was shown to have reduced output for the purpose of driving up the price of electricity, that would be unusual enough to be relevant evidence in a dispute regarding why output was cut by other officials at a different plant.

would merely be a "hardly surprising" event that surely occurs at any employer, or was the telltale sign of something more serious, would at least ordinarily be a matter for the jury to determine. Even in the absence of a pattern, even one or a few instances of other-supervisor discrimination could indicate the existence of a relevant informal practice of discrimination if those other instances of discrimination were sufficiently similar in time, location, and/or method to the circumstances of the named plaintiff.[48]

B. Rule 401 Permits Use of Evidence of A Culture or History of Discrimination

The district court erred in barring all evidence of a culture of discrimination at Sprint.[49] This Court has repeatedly recognized that evidence of a culture or atmosphere of discrimination can be significant in determining whether a particular action was taken with a discriminatory purpose. Actions taken by officials with no direct role in a disputed employment action can create, and indicate the existence of, a "discriminatory atmosphere in which individuals could

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[48] In *McDonnell Douglas*, for example, the Court held Green could support a claim that he had not been rehired because of his race by adducing evidence as to the company's "treatment of [Green] during his prior term of employment." 411 U.S. at 804.

[49] The court of appeals, in overturning the in limine order, held plaintiff was entitled to offer proof (including through the excluded witnesses) of an atmosphere of discrimination at Sprint. (Pet. App. 14a).

justify their bias." *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995). In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court noted that the conduct of prosecutors in a particular trial could be shaped by their awareness of "the culture of discrimination" in their office. 537 U.S. at 347. This Court has held that where there has been a history of discrimination, special preventative measures may be required to prevent the resulting discriminatory culture from shaping future actions. *Local 28 of Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 449 (1986).[50] Appellate decisions in eleven circuits have found that proof of the presence (or absence) of a culture or atmosphere of discrimination is important evidence in determining whether discrimination occurred in a particular case.[51]

This Court has recognized in a wide variety of circumstances the potential impact on human behavior that can follow from the culture or atmosphere of the environment in which an individual acts or works. *Ferri v. Ackerman*, 444 U.S. 153, 202-04 (1979)(adverse impact on government officials of "an atmosphere of intimidation" created by lawsuits); *Sheppard v. Maxwell*, 384 U.S. 333, 356 (1966)(defendant denied a fair trial because the proceedings occurred in the "atmosphere of a 'Roman Holiday'"); *American Ship Bldg., Co. v. NLRB*, 380

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[50] "[E]ven where the employer . . . formally ceases to engage in discrimination . . . . 'where a discriminatory atmosphere has been shown, the more common forms of relief may not be . . . adequate.' *Taylor v. Jones*, 653 F. 2d 1193, 1203 (8th Cir. 1981)."

[51] See Brief Appendix.

U.S. 300, 306 (1965)(violations of the NLRA created "an atmosphere in which the free opportunity for negotiation contemplated by [the NLRA] does not exist"); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)("the inherent pressures of the interrogation atmosphere"); *United States v. Enmons*, 410 U.S. 396, 410 n. 20 (1973)("the charged atmosphere attending a prolonged labor dispute" can lead to injury to persons or property).

In a wide range of circumstances, a tainted or permissive institutional culture has led to violations of federal law. *United States v. Martin*, 135 Fed. Appx. 411, 413 (11th Cir. 2005)(securities fraud)[52]; *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 291 (D. Mass. 1994)(mail fraud and shipment of adulterated medical supplies)[53]; *Ohio Public Employees Retirement System v. Fannie Mae*, 357 F. Supp. 2d 1027, 1030 n. 5 (S.D.Ohio 2005)(securities fraud)[54]; *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.

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[52] "Your Honor, you asked a question as to why someone like Mr. Martin would do something like this. I would suggest that part of the reason was the culture, the corporate culture, that existed at HealthSouth during that period of time."

[53] "This is a case in which a pervasive and powerful corporate culture exalted the value of profit above the value of human life."

[54] The Office of Federal Housing Enterprise Oversight concluded that Fannie Mae "maintained a corporate culture that emphasized stable earnings at the expense of accurate financial disclosures."

3d 437, 442 (D.C.Cir. 2004)(unfair labor practices)[55]; *United States v. Brodie*, 403 F. 3d 123, 155 (3d Cir. 2004)(Trading With The Enemy Act)[56]; *Carlson v. Xerox Corp.*, 392 F. Supp. 2d 267, 275 (D.Conn. 2005)(securities fraud)[57]; *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1035 (N.D.Cal. 2002)(federal Safe Drinking Water Act)[58]; *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549, 632 (S.D.Tex. 2002).

In the workplace context, the culture of an organization often plays a critical role in shaping the conduct and attitudes of officials and workers alike. The day-to-day activities of those employees, and the overall success of the employer, are not dictated solely, or perhaps even primarily, by the formalities written into manuals, memos and posted notices. The overall culture of the employer may play a far greater role in determining whether workers are hard working or

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[55] "[T]he Board found that anti-union conduct 'so pervasive as to have created a corporate culture of lawlessness.'"

[56] "The government evidence shows a corporate culture pervaded by the use of code words for Cuba . . . an overall corporate culture of deceit concerning transactions with Cuba."

[57] "[T]he reason behind the accounting problems was a 'corporate culture that cut bookkeeping corners to make up for deteriorating business fundamentals.'"

[58] "The seriousness, duration and willfulness of Defendant's non-compliance with legal requirements are evidence of a corporate culture . . . in which both regulations and regulators are seen as an inconvenience rather than a means of protecting the public."

lackadaisical, honest or corner-cutting, safety-conscious or careless, attentive to customers or indifferent. Subordinates glean the actual priorities, concerns, and interests of their superiors from the day-to-day signals apparent in the office or plant--from speeches or asides at meetings, jokes in the hall, the patterns of promotions, whether conduct that violates a particular rule leads to serious discipline or is simply ignored. The attitudes and values of a supervisor may also be shaped over time by those of his or her peers, in the same manner that attitudes and values spread in any other aspect of society.

For managers and academics alike, an understanding of the way in which corporate culture is created, and in turn shapes the behavior of workers and supervisors, is an essential part of corporate governance.[59] Business school courses routinely deal with the importance of corporate culture[60]; some twenty-two Harvard Business School faculty members list corporate culture as an area of professional specialty or interest.[61] For aspiring or established supervisors and managers, Amazon.com lists for sale more than twenty-five books about corporate culture.[62]

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[59] See Remarks by The President at The Corporate Responsibility Session, August 13, 2002, 2002 WL 1839143 *6-*7.

[60] See Brief Appendix.

[61] See http://pine.hbs.edu/external/areasInterestShow.do?KEY=KWD visited October 5, 2007.

[62] J. C. Miller, *Build A Winning Corporate Culture* (2004); S. M. Davis, *Managing Corporate Culture* (1990); F.C. Ashby, *Revitalize*

Sprint itself recognizes the practical importance of corporate culture. The company's website assures current and prospective employees that

> [f]rom respect for each other and dedication to the communities in which we live and work, we have managed to create a culture in which each employee has the opportunity to learn and grow, and contribute.[63]

> Our corporate culture looks to open doors and reward those whose talent carries them through.[64]

A Web posting soliciting job applicants asks, "Do you want to work for an organization that offers a professional culture and first-rate training?"[65] The Sprint website announces with pride that "As Sprint Nextel chairman and CEO, [Gary D.] Forsee has worked to establish a corporate culture of innovation

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Your Corporate Culture: Powerful Ways to Transform Your Company into a High-Performance Organization (1999); M. Williams, *Fit In! The Unofficial Guide to Corporate Culture* (2007).

[63] http://www.sprint.com/companyinfo/diversity/culture/ visited October 1, 2007.

[64] http://www.sprint.com/companyinfo/diversity/home.html visited October 1, 2007.

[65] http://www.sprintkioskcareers.com/ visited October 1, 2007.

and performance integrated with corporate social responsibility."[66]

Corporate culture can play an important role, for good or for ill, in shaping the attitudes of supervisors towards the types of discrimination forbidden by federal law. Biases against particular types of workers are not genetic, nor are they acquired solely, or perhaps even primarily, outside the job. Often such attitudes toward discrimination are shaped by on-the-job experiences, the actions, inaction and statements of an individual's superiors and peers. That is particularly likely in the case of age discrimination, which Congress concluded "rarely was based on the sort of animus motivating some other forms of discrimination, [but] was based in large part on stereotypes" about the competence and productivity of older workers. *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). A reasonable trier of fact, in determining whether a particular employment action was taken with a discriminatory purpose, could reasonably want to know if the supervisor who took that action had been exposed at that employer to a culture of discrimination; or, to an environment in which anti-discrimination principles were consistently enforced.

There will, rarely be *direct* evidence of the statements and actions that could create a culture of discrimination. *See Desert Palace v. Costa*, 539 U.S. 90, 100 (2003). Such attitude-shaping events will not

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[66] http://www2.sprint.com/mr/ex_dtl.do?id=100 visited October 1, 2007.

ordinarily be memorialized or preserved in a manner likely to be revealed by discovery. (See n. 45, supra). The meetings, telephone calls, and casual conversations through which an attitude of discrimination may spread among a group of supervisors are unlikely to be recorded or transcribed. Few managers today who want to encourage the use of layoffs to create a younger work force would be so rash as to put that in writing.

As is often true in discrimination cases, the trier of fact may need to rely on "circumstantial evidence of the corporate culture existing" when the disputed action occurred. *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 132 (3d Cir. 1997). A critical indicator of whether the culture in which one supervisor works encourages or tolerates discrimination is whether other supervisors, exposed to that same corporate culture, have themselves concluded that their common employer views discrimination with permissiveness or even favor. In *Miller-El v. Cockrell*, for example, this Court correctly attached weight to the fact that one supervisor had warned a subordinate that he would be fired if he permitted any African-Americans to serve on a jury. 537 U.S. 322, 334 (2003). There was no claim that either the supervisor or subordinate involved had played any role in the *Miller-El* trial, or had ever directed the particular prosecutors who handled that trial. But the supervisor who had issued that admonition obviously had concluded, from the general tenor and history of the office--information likely evident as well to all who worked there--that the deliberate exclusion of minority jurors was favored (or at least tolerated) by the highest officials in the office.

A supervisor who openly engages in discrimination certainly does not intend to forfeit his or her own job or career. Such brazen action would ordinarily occur only if the supervisor were quite confident, in light of the general attitudes and practices within the firm, that higher officials would not impose any sanctions if they were to learn that discrimination was occurring. Discriminatory action grounded on such experience-based confidence may well speak louder than the words of any witness. Of course a supervisor who engaged in such open discrimination might be mistaken about the attitudes of his superiors, or might merely be exceptionally foolhardy or hateful. But a trier of fact, in attempting to decide whether the environment at a workplace encouraged or tolerated discrimination, could certainly give weight to the fact--if it were the case--that one or more supervisors who actually worked there manifestly believed that they could engage in such discrimination without endangering their own position with that employer. If a supervisor is willing to bet his or her job on the proposition that the employer will tolerate discrimination, a jury could reasonably conclude that supervisor knew what he or she was doing, and could infer that other supervisors--including the supervisor who took the adverse action complained of--could have reached the same conclusion from similar experiences.

Not every act of other-supervisor discrimination would necessarily have this tell-tale quality. A biased supervisor might engage in discrimination, even though well aware that he could be fired for doing so, if the supervisor were confident that such discriminatory act would go undetected. It might be difficult to draw any conclusion about the culture at an

employer if a single discriminatory supervisor (like an embezzler) had taken significant precautions to assure that his discrimination would go undetected. But that is not what occurred in the instant case. One supervisor expressly instructed subordinates to engage in age discrimination, an action which strongly indicated that supervisor was confident age discrimination was a practice regarded by management as acceptable, if not desirable. Another supervisor frankly told a witness that she had received an adverse appraisal, shortly before she lost her job, because she was "too old" for her job. If presumably well informed Sprint officials in 2001-03 had concluded the company regarded age discrimination with favor or tolerance, and it was thus safe (or even desirable) to engage in such discrimination, a jury could reasonably infer Reddick might have come to the same conclusion.

A history of discrimination is probative for similar reasons. If company officials in the past engaged in discrimination, they likely did so only after concluding from the environment in the plant or office that such discrimination was then permissible. A reasonable trier of fact could conclude that the circumstances that led to that conclusion would have a continuing effect on others who had worked there at the time, or that the circumstances themselves might also continue. Indeed, the visible effects of past discriminatory practices could themselves be an important factor in convincing subsequent supervisors of the acceptability of discrimination. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)("prior acts" of discrimination can be relied on as "background evidence" to prove the existence of a discriminatory purpose).

A per se rule requiring exclusion of evidence of a culture or history of discrimination would significantly narrow the scope of the ADEA itself. The effect of the in limine order in this case was to require the plaintiff to show that Reddick bore some personal, idiosyncratic animus towards older workers which led him to discriminate against Mendelsohn. Counsel for the employer argued with considerable force that if Reddick really harbored such personal animosity it would have been manifested independently of the layoffs, that Reddick would, for example, have made derogatory remarks about older workers. (Tr. 1345). But the prohibition against intentional discrimination is not limited to actions taken with such animus. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 667-69 (1987) The ADEA[67] is also violated if a supervisor lays off older workers simply because that is what he thinks higher company officials, or even his peers, want him to do.[68] A supervisor who engages in

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[67] In enacting the ADEA, Congress relied heavily on a report from the Secretary of Labor that had been mandated by Title VII of the 1964 Civil Rights Act. That report concluded age discrimination in employment was widespread, but it was based on employers' stereotypes, not on any personal animus towards older workers. "We have found no evidence of prejudice based on dislike or intolerance of the older worker." *The Older American Worker: Age Discrimination in Employment, A Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964*, p. 6 (1965). *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 587 (2004); *EEOC v. Wyoming*, 460 U.S. 226, 231-32 (1983).

[68] Mendelsohn was only required to show that age was a motivating factor in the decision to lay her off. She was not

discrimination for those reasons would not have any personal history of discrimination or biased remarks. The in limine order, however, largely precluded Mendelsohn from offering evidence of such a motive, effectively placing beyond the scope of the statutory prohibition discrimination engaged in for reasons other than personal bias. Such a limitation would have the perverse effect of limiting the ADEA to instances of personal idiosyncratic discrimination, which are likely to injure only a small number of older workers, while effectively denying the protection of the law at employers where a culture of discrimination may lead to far more widespread discrimination.

C. Rule 401 Permits Use of Evidence of Other-Supervisor Discriminatory Statements

The blanket exclusionary order precluded introduction of evidence of age-biased remarks by any Sprint manager or official other than Reddick. But proof of biased remarks by one supervisor can be probative evidence of the corporate culture and attitudes potentially affecting all supervisors. The lower courts have repeatedly found such remarks, even if made by supervisors not directly involved in the disputed adverse action, to be evidence of a culture of discrimination and thus proof of "the influences behind the action taken with respect to the individual

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required also to prove that her "supervisors were personally prejudiced against h[er]." *McAlester v. United Airlines, Inc.*, 851 F. 2d 1249, 1260 (10th Cir. 1988).

plaintiff." *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 597-98 (1st Cir. 1987).[69]

A biased remark can be particularly telling evidence of the existence of a discriminatory atmosphere. A covert act of discrimination might not be indicative of a discriminatory culture; a biased official, although well aware that the employer would punish such behavior, may have engaged in discrimination in the belief that no one would realize that he or she had done so. But a biased remark by definition leaves a witness with personal knowledge of what has occurred. The possibility the discriminatory behavior will go undetected by higher officials is far smaller, and even that may rest largely on the chance, probative in itself, that the witness also does not believe those higher officials would want to know if a supervisor had made a discriminatory remark.

Here, Sprint supervisors assertedly asked "[C]an't we find someone who's younger [?]" and told a worker that she was receiving an adverse evaluation because she was "too old for the job." No supervisor would admonish a subordinate not to hire a drug-free applicant by objecting, "Can't we find a heroin user?" Nor would any supervisor tell a worker she had been

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[69] *E.g.*, *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F. 3d 11, 18-19 (1st Cir. 2007); *Asmo v. Keane, Inc.*, 471 F. 3d 588, 595 (6th Cir. 2006); *Cummings v. The Standard Register Co.*, 265 F. 3d 56, 63-64 (1st Cir. 2001); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F. 3d 344, 356 (6th Cir. 1998); *Robinson v. Runyon*, 149 F. 3d 507, 512-14 (6th Cir. 1998); *Walden v. Georgia-Pacific Corp.*, 126 F. 3d 506, 521-22 (3d Cir. 1997).

given a poor evaluation because, "You are too honest and unwilling to take bribes." In either case, the speaker would be quite sure such remarks would be reported and lead to serious disciplinary action. If the Sprint supervisors in question made the asserted age-biased statements, they must have concluded from the environment at Sprint that age discrimination, unlike drug use or corporate bribery, would not be regarded by higher officials as significant misconduct. The asserted remarks were particularly telling because they were made by Sprint officials with "authority to render personnel decisions." *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 133 (3d Cir. 1997).

If ageist remarks were indeed made by Sprint officials, counsel for petitioner assures this Court that "Sprint condemns them." (Pet. Br. 31). But plaintiff was entitled in the district court to offer sworn testimony indicating that in 2001-03 Sprint's own supervisors had concluded, to the contrary, that the company actually did not object to, or necessarily disagree with, such biased statements. A reasonable jury could infer that Reddick and other supervisors who worked in the same environment might have reached a similar conclusion and have made lay off decisions in light of that corporate culture.

D. Rule 401 Permits Use of Other-Supervisor Evidence to Demonstrate Pretext

The blanket exclusionary order barred all use of other-supervisor evidence, thus precluding use of that evidence to demonstrate the pretextuality of Sprint's proffered explanation for the decision to lay off Mendelsohn. In overturning that order, the court of

appeals correctly held that other-supervisor evidence could be used where it "tends to discredit the employer's assertion of a legitimate motive." (Pet. App. 6a).[70]

In any employment discrimination case in which the plaintiff establishes a prima facie case, the employer is required to (and almost invariably does) offer some legitimate, non-discriminatory explanation for the disputed adverse action. The plaintiff can then seek to prove a violation of the law in a number of ways, including by showing that the proffered explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000). Other-supervisor evidence may be useful in assessing whether a proffered explanation is indeed pretextual. The proffered other-supervisor evidence in the instant case tended to demonstrate pretext, because the specific methods used to discriminate against the excluded witnesses were similar to the assertedly discriminatory manner in which Mendelsohn had been selected for layoff.

Before her dismissal, Mendelsohn had received uniformly high ratings on Sprint's regular "numeric" evaluations, which were disclosed to employees.[71] In

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[70] In determining whether a particular proffered explanation was pretextual, evidence of how other workers were treated by other supervisors may of course be exculpatory as well as inculpatory. *See Ansell v. Green Acres Contracting Co., Inc.*, 347 F. 3d 515, 521 (3d Cir. 2003).

[71] Tr. 463-504; Exs. 63-69.

late 2001, Sprint created a second set of secret evaluations, known as the "Alpha" or "shadow" ratings, which were not to be disclosed to workers. Although the Alpha "forced ranking" ratings were not supposed to be used in making RIF decisions, Mendelsohn--who had received a low Alpha rating--was laid off because of it.[72] Several of the excluded witnesses similarly would have testified that, despite histories of favorable ratings, the Alpha ratings also were improperly used to dismiss them.[73]

When Mendelsohn was terminated, she was told a "workforce reduction" was the reason.[74] In fact, her job duties were simply assigned to another, younger worker.[75] Several of the proffered witnesses would have testified they were given similar false pretextual explanations for their dismissal.[76]

Sprint's official "mandatory" "Displacement Guidelines" provided company-wide rules for RIF selections.[77] Reddick did not even know of the

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[72] Tr. 43-49, 978-81, 1020.

[73] Borel Dep. 40-42; John Hoopes Dep. 37; Bonnie Hoopes Dep. 50-51.

[74] Tr. 617-19; Ex. 58.

[75] Tr. 176; Ex. 4.

[76] Bonnie Hoopes Dep. 50-51, 58-59; John Hoopes Dep. 34-36; Borel Dep. 93-94.

[77] Ex. 17.

mandatory RIF policy. (Tr. 1159). A worker's length of service was to be considered in selecting employees to be laid off. Mendelsohn had far more seniority than the younger workers who were retained in her unit.[78] Several of the other alleged discrimination victims likewise would have testified they too had greater seniority than younger workers retained in their business units.[79]

There is more; but in short, because of the blanket exclusionary order, Sprint at trial was able to portray its treatment of Mendelsohn as an isolated case--a single assertedly less able worker being laid off because of her personal failings. Because the order effectively limited the evidence before the jury to the small unit in which Mendelsohn had worked, Sprint was able to argue that Mendelsohn "was the only person over 40 without a job because of this reduction in force." (Tr. 1364). In fact, there were many other persons "over 40 without a job" because of the RIF, and there was substantial evidence that they were the victims of age discrimination. The wholesale exclusion of that evidence deprived Mendelsohn of a "full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for [her layoff], the decision was in reality [age] premised." *McDonnell Douglas v. Green*, 411 U.S. 792, 805 n. 18.

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[78] Tr. 123-24, 208-09.

[79] Bonnie Hoopes Dep. 82-83; John Hoopes Dep. 25-29.

II. EVIDENCE IS ADMISSIBLE UNDER RULES 401 AND 402 IF A REASONABLE TRIER OF FACT COULD FIND IT HAS A TENDENCY TO MAKE A FACT OF CONSEQUENCE MORE OR LESS PROBABLE

In excluding the other-supervisor evidence in this case, the district judge made a second, more fundamental error. Faced with a serious dispute about the probativeness of the evidence, the trial judge assumed the evidence could not be admitted unless the judge personally found that evidence probative. In denying Mendelsohn's motion for a new trial, the judge explained that she herself was not convinced that other-supervisor evidence would make it "more likely that the decision makers in this case discriminated against plaintiff." (JA 436a).

Petitioner insists a jury should not be permitted to consider the possible probativeness of evidence unless the trial judge has first decided that he or she personally finds it is persuasive. The controlling question, according to petitioner, is whether "a district *court* . . . could find a link between" the proffered evidence and the disputed issues in a case. (P.Br. 32-33)(emphasis added). Only after the judge has found that there is such a link, petitioner contends, is the jury allowed to make its own determination of whether such a connection exists.

The Tenth Circuit correctly rejected this approach. The question before a trial judge, the court of appeals recognized, is not whether the judge personally found the disputed evidence to be persuasive, but only whether "a reasonable trier of fact" could so find. (Pet.

App. 14a). Invoking a metaphor widely used in the lower courts, the court of appeals held:

> [t]he evidence which Mendelsohn seeks to present, "is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow . . . ."

(Pet. App. 14a)(*quoting Greene v. Safeway Stores, Inc.*, 98 F. 3d 554, 561 (10th Cir. 1996)). Five other circuits, in a wide variety of civil and criminal cases, have used similar language in holding that the issue under Rule 401 is whether a "reasonable trier of fact" or a "reasonable jury" could find that the evidence in question had "any tendency" to make a disputed fact more or less probable.[80] The United States has repeatedly invoked this "reasonable jury" rule in defending the admission of evidence in criminal cases.[81]

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[80] *E.g., United States v. Ortiz*, 966 F. 2d 707, 713 (1st Cir. 1992)("reasonable jury"); *United States v. Iafelice*, 978 F. 2d 92, 97 (3d Cir. 1992)("reasonable jury"); *United States v. Cartwright*, 359 F. 3d 281, 290 (3d Cir. 2004)("reasonable jury"); *Walther v. Lone Star Gas Company*, 952 F. 2d 119, 124 (5th Cir. 1992)("reasonable jury"); *United States v. Duarte*, 950 F. 2d 1255, 1259 (7th Cir. 1992)("reasonable jury"); *Fisher v. Pharmacia & Upjohn*, 225 F. 3d 915, 922 (8th Cir. 2000)("reasonable trier of fact"); *Morgan v. Arkansas Gazette*, 897 F. 2d 945, 951 (8th Cir. 1990)("reasonable trier of fact").

[81] Brief for the United States, *United States v. Arias*, 238 F. 3d 1 (1st Cir. 2001), No. 99-1924 (1st. Cir.), 2000 WL 35570974 *24; Brief of Appellee, *United States v. Sekoumar*, 118 F. 3d 1579 (3d

The distinct roles of judges and juries in evaluating the probativeness of evidence is well established. For a judge,

> [t]he question to be asked in determining the relevance of evidence is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence.

2 *Weinstein's Federal Evidence* § 401.04[2][a], at 401-21.

> Determining relevancy involves "weighing" the proof only in the limited sense of determining that a reasonable person acting as trier could assign some weight to the evidence in deciding the point it is offered to prove.

1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:1 at 544 (3d ed. 2003). "The judge can only ask, could a reasonable juror believe that the [evidence] makes [a disputed fact] more probable than it would otherwise be . . . ?" J. Strong, *McCormick on Evidence*, 279.[82]

Cir. 1997), No. 96-5588 (3d Cir.), 1997 WL 33710247 *20; Brief for Appellee, *United States v. Yates*, 187 F. 3d 633 (4th Cir. 1999), Nos. 98-4644, 98-4726 (4th Cir.), 1999 WL 33722152 *17 n. 11.

[82] The disputed fact need not be the ultimate fact in question, as Sprint and the district court wrongly insist. See n. 31, supra.

Whether a particular item of evidence is probative will often be a central issue in a civil or criminal case. Trial counsel frequently contend that evidence relied on by the opposing party is worthless, that such evidence, in the terms of Rule 401, lacks "any tendency" to support the claim or defense of the other party. It is frequently the central purpose of the trial, and the key role of the trier of fact, to resolve such disputes. If filing a pretrial in limine motion under Rule 401 shifted the primary responsibility for resolving such common disputes to the district judge, trial by jury could easily be transformed into trial by in limine motion.

The more limited role of judges under Rule 401 reflects the constraints that apply to a judge in ruling on a post-trial motion for judgment as a matter of law, or on a pretrial motion for summary judgment. In determining either of those motions, the judge is required to look at the evidence in the light most favorable to the non-moving party, and to grant the motion only if no reasonable jury could return a verdict for the non-moving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149 (2000); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). If in the instant case the disputed evidence had been admitted, the jury had returned a verdict for the plaintiff, and Sprint had then filed a motion for judgment as a matter of law, the district judge would have been required to look at that evidence in the light most favorable to Mendelsohn, and to inquire only whether a reasonable jury could have relied on that other-supervisor evidence. So long as a reasonable jury could have done so, the judge could not grant such a motion for judgment as a matter of law simply

because she personally did not find the evidence persuasive. A judge cannot exercise a greater role in assessing evidence, when essentially the same dispute about the weight of evidence arises in the context of an in limine motion under Rule 401 of the Rules of Evidence — rather than a motion for summary judgment or judgement as a matter of law under Rules 50 and 56 of the Federal Rules of Civil Procedure.

The well-established limitations on the judge's role in evaluating the weight (or lack thereof) of evidence is an essential consequence of the constitutional, and in this case statutory[83], right to trial by jury. The right to a jury trial would mean little if the jury could only hear evidence which a trial judge had already found personally persuasive. In according claimants under the ADEA the right to a jury trial, Congress presumably concluded that juries were more familiar than judges with the realities of the modern day plant floor or office, and were best able to draw sound inferences about events occurring in those settings from the evidence that might be adduced at trial. *See Parklane Hosiery Co., Inc. v. Lane*, 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting)("Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.") A determination of the significance of evidence turns not only on the other evidence in the case, but also on "the trier's personal experience and knowledge." 2 *Weinstein's Federal Evidence*, § 401.04[2][b] at 401-22.3.

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[83] 29 U.S.C. § 626(c)(2).

> It is important for the judge to bear in mind that the experience of the jurors may be quite different from that of the judge and that consequently their perceptions of proffered evidence will vary. That is a natural consequence of our jury system. A judge may be doubtful about the probative force of certain evidence and yet admit it because the jury, in its rightful function, may perceive it differently than the judge does.

Id. § 401.03[2][b] at 401-9 to 401-10.

Evaluation of Sprint's objections to the use of other-supervisor evidence necessarily rests to a substantial degree on an understanding of the typical American workplace. Sprint argues that other-supervisor evidence is never probative because there is simply "no connection" between the actions and attitudes of two different supervisors who happen to work for the same employer. (Pet. Br. 9). That might indeed be the case if company supervisors in the United States were usually organized like sleeper terrorists, each carefully isolated from one another and out of contact for long periods of time with any higher authority. Somewhat more plausibly, there may be specific instances in which supervisors function with such great autonomy, and so little direction or oversight, that other-supervisor evidence might deserve little or even no weight. Juries are uniquely competent to understand in light of their own employment experiences whether the circumstances of a particular case might be of that sort.

Jurors are also able to assess the probativeness of disputed evidence in the context of all the evidence and issues in the entire trial, something which a trial judge cannot do in ruling on a pretrial in limine motion, and can attempt only to a limited degree in the midst of trial testimony. A trial judge cannot know when he or she rules on the admissibility of evidence what inferences may be drawn and what subsidiary issues might loom larger during the later course of jury deliberations. By requiring only that evidence provide information which a reasonable jury could conclude has some tendency to prove or disprove a relevant fact, the law makes due allowance for the unavoidable limitations on the ability of a trial judge to determine with confidence whether that evidence might ultimately be of significance to the trier of fact.

This is not to suggest that the concerns raised by Sprint regarding the probativeness of other-supervisor evidence are necessarily groundless or made in bad faith. There will doubtless be cases where more specific objections to particular items of other supervisor evidence, or even general arguments questioning the value of such evidence, might be quite persuasive. There may be cases in which the events involving other supervisors were so far removed in location or time that no reasonable trier of fact could find them relevant.[84] But *Mendelsohn* is not such a

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[84] *See, e.g., Schrand v. Federal Pacific Electric Co.*, 851 F. 2d 152, 155-56 (6th Cir. 1988)(barring, in dispute over dismissal in Ohio, testimony regarding alleged discriminatory dismissals in New Jersey and New Mexico, "places far from the plaintiff's place of employment.")

case. So long as a reasonable jury could conclude that disputed other-supervisor evidence has any tendency to support a finding of discriminatory purpose, those objections and arguments must be made to the trier of fact, and cannot constitute a basis for excluding the evidence under Rules 401 and 402.

III. RULE 403 NEITHER REQUIRES, NOR INVARIABLY PERMITS, THE EXCLUSION OF OTHER SUPERVISOR EVIDENCE

Other-supervisor evidence is not, as Sprint suggests, invariably subject to exclusion under Rule 403. Nor did the Tenth Circuit hold, as Sprint insists, that "it never may be excluded." (Pet. Br. 39).

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Because the factfinding process is imperiled by the exclusion of relevant evidence under Rule 403, courts "must take special care to use it sparingly." 2 *Weinstein's Federal Evidence* §403.02[2][a] at 403-11.

> This approach is sensible because in the search for truth much if not most probative evidence could be misused, appeal to emotions, or confuse the factfinder, and attempts to purify trials by filtering out proof that raises modest risks

would likely lead to uninformed and unreliable verdicts.

1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:12 at 637. Rule 403 "tilts in favor of admissibility." *Mattenson v. Baxter Healthcare Corp.*, 438 F. 3d 763, 771 (7th Cir. 2006). In determining whether to exclude evidence under Rule 403, courts should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Weinstein's Evidence* ¶ 403(3) (1975).

The terms of Rule 403 embody three distinct requirements. First, because any excluded evidence must be "substantially outweigh[ed]" by one of the Rule 403 factors, exclusion under Rule 403 will at least usually be limited to evidence that "has only marginal probative value." (U.S.Br. 24). Second, even where that is the case, the value of that evidence will only be "substantially outweigh[ed]" if the countervailing problem regarding one or more of the Rule 403 factors is demonstrably clear and serious. Third, evidence cannot be excluded under Rule 403 if the potential problems could be significantly reduced "by way of contemporaneous instructions to the jury followed by additional admonitions in the charge," 2 *Weinstein's Federal Evidence* § 403.02[2][c] at 403-16[85], or in some other manner.

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[85] "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." Rule 403, Committee Note. Also see *Huddleston*, supra, 485 U.S. at 691-92.

Manifestly not all (or necessarily any) of these three requirements will invariably be satisfied in every case involving other-supervisor evidence. Other-supervisor evidence is not invariably of marginal probativeness. To the contrary, as the United States correctly observes, in some cases a reasonable trier of fact could find such evidence of decisive importance. (U.S.Br. 11, 23). "[S]uch evidence 'may be critical to the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.'" *Walden v. Georgia-Pacific Corp.*, 126 F. 3d 506, 521 (3d Cir. 1997)(atmosphere of discrimination)(*quoting Antol v. Perry*, 82 F. 3d 1291, 1302 (3d Cir. 1996)).

Petitioner asserts that consideration of evidence of specific instances of other-supervisor discrimination would invariably cause enormous delays. If the five disputed witnesses had been permitted to testify in the instant case, petitioner now asserts, the case "surely would have become a four-, five- or six-*week* trial." (Pet. 15)(emphasis in original). That is demonstrably incorrect. Below, after the Tenth Circuit overturned the disputed in limine order, Sprint's counsel on remand advised the district court Sprint had decided not to call any additional witnesses to rebut the disputed testimony, and did not dispute plaintiff's suggestion that hearing plaintiff's witnesses would in fact require (at most) only two additional days of trial.[86] At the first trial, Sprint also had decided (even before knowing the result of its in limine motion) not to call any witnesses to respond to the other-supervisor

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[86] JA 442a-445a.

testimony.[87] Petitioner's brief in this Court identifies a number of cases wherein the trial court admitted testimony about individual instances of other-supervisor discrimination. The average total length of those trials was less than seven days.[88]

Sprint argues that juries would necessarily become hopelessly confused if required to resolve whether any Sprint employee other than Mendelsohn had been the victim of discrimination. (P. Br. 41-42). But trials involving separate claims by two or more individuals have long been commonplace in American jurisprudence. Far from being frowned on by the Federal Rules, such proceedings are expressly contemplated by the joinder provisions of Rule 20 of the Federal Rules of Civil Procedure. "[J]oinder of . . . parties . . . is strongly encouraged." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). If a single complaint had been filed by six plaintiffs--Mendelsohn and the five excluded witnesses--it would simply have been a run-of-the-mill civil action involving six named plaintiffs. Civil actions involving joinder of claims of

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[87] JA 234a-248a.

[88] *Martin v. Citibank, N.A.*, 762 F. 2d 212, 215 (2d Cir. 1985)(3 days); *Wyvill v. United Companies Life Insurance Co.*, 212 F. 3d 296, 300 (5th Cir. 2000)(6 days); *Schrand v. Federal Pacific Electric Co.*, 851 F. 2d 152 (6th Cir. 1988)(5 days)(Appellant's Opening Brief, 1987 WL 882351 *1); *Haskell v. Kaman Corp.*, 743 F. 2d 113 (2d Cir. 1984)(10 days)(Docket Entries, No. 78-684 (D.Conn.), pp. 6-7); *Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa. 1980)(6 days).

multiple parties, in some instances significantly more than six, are routinely tried in federal and state court.

Finally, Sprint argues that it would always be highly prejudicial if a jury learned about any incident of alleged discrimination other than the single decision to lay off Mendelsohn. According to petitioner, such a jury would likely be so incensed by that disclosure that it would then punish the employer by finding, regardless of the evidence, that the named plaintiff was laid off because of her age. This argument proves far too much; it would be equally applicable to a case in which two plaintiffs were included in the same complaint, in which a single plaintiff included two different claims (e.g. involving two different supervisors) in her complaint, or in which a single plaintiff with a single claim wanted to call a *same*-supervisor witness. Here, as in a case involving multiple ADEA plaintiffs, there is no reason to doubt the ability or willingness of a properly instructed jury to deal separately, and fairly, with each set of facts. [89] Juries in multi-plaintiff discrimination claims routinely reject the claims of some plaintiffs while accepting the claims of others.

Congress enacted the ADEA, Title VII, and other similar statutes because it regarded the eradication of discrimination in employment as goal of great national importance. But that does not mean that a witness' claim of discrimination is so incredibly inflammatory as to carry with it an intolerable risk of the unfair

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[89] *See Arlio v. Lively*, 392 F. Supp. 2d 317, 324 (D.Conn. 2005)(quoting limiting jury instruction).

prejudice to which Rule 403 is addressed. The very subject matter of an ADEA claim is age discrimination; such a claim could not be fairly presented if evidence of age discrimination itself is treated as unfairly prejudicial under Rule 403.[90]

> A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan v. Kempiners, 831 F. 2d 690, 698 (7th Cir. 1987)(Posner, J.).

IV. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER'S IN LIMINE MOTION SHOULD HAVE BEEN DENIED

The sole issue raised by Sprint's motion and the blanket exclusionary order was whether *all* other-supervisor evidence must invariably be excluded in a discrimination case. The only objection raised by that motion was that any testimony about officials other than Reddick was inadmissible per se. Petitioner did not advance any more specific objection to any particular aspect of the possible testimony of Mendelsohn's witnesses.

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[90] *See Robinson v. Runyon*, 149 F. 3d 507,515 (6th Cir. 1998)("It is axiomatic that the available evidence provided to establish racial animus may be racially inflammatory.")

In the Tenth Circuit, petitioner again advanced this per se objection to all other-supervisor evidence. Faced only with the single per se argument that had been made below, the court of appeals rejected that contention and--having disposed of the only objection to the testimony that Sprint was making--merely said the witnesses "should have been allowed to take the stand." (Pet. App. 13a). As a precaution, the court of appeals took the additional step (never requested by Sprint) of emphasizing that the court on remand could consider whether some testimony should be excluded on grounds Sprint as of yet had not raised.[91]

The United States, although agreeing the requested per se order was improper, argues the court of appeals should sua sponte have instructed the district court to proceed to evaluate each aspect of "the particular testimony that respondent's proffered witnesses would have given" (U.S. Br. 27) in light of the "other evidence in the case or appropriate trial considerations." (U.S.Br. 29). Such further proceedings, the government argues, would be appropriate to fully address "the issue of admissibility." (U.S. Br. 26).

But the question before the court of appeals was not "the issue of admissibility"; the question, rather, was only whether the specific motion that had been

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[91] Pet. App. 15a (reserving the discretion of the district court on remand to issue "ruling[s] regarding the proper use and limitations of such testimony"), 16a n. 6 ("Nothing in our ruling is intended to limit the district court's discretion during trial to issue limiting instructions or rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced.")

filed by Sprint should have been granted. The filing of an in limine motion for a blanket exclusionary order does not confer on the courts a roving commission, or responsibility, to address any and all imaginable "issues of admissibility." In the courts below, Sprint itself never proffered any more specific objections to "particular testimony." The court of appeals was not obligated to address, or to remand for district court consideration of, arguments that Sprint itself had never made and might yet choose not to make.

If this case were remanded as suggested by the government, the district court simply would not have before it any motion or relevant arguments on which it could rule. Rather, that court would have to request Sprint to file — for the first time — a testimony-specific set of objections. Whatever objections Sprint might file (if any) would in reality constitute an entirely new type of motion. It is not certain that Sprint would choose to make more particularized objections.

If the disputed evidence had been admitted (and the jury had ruled for the plaintiff), and in the proceedings below Sprint had advanced only the per se arguments that it in fact raised, the Tenth Circuit's rejection of that per se rule would have been the end of the matter. Petitioner would not have been entitled to a remand in which it could file a new post-trial motion attacking the admission of that evidence (and the subsequent jury verdict) on some new ground which it had failed to raise before or during trial.

In the actual procedural posture of this case, however, the court of appeals has ordered a new trial.

In the course of any such trial, Sprint will be free to advance with regard to particular aspects of the proposed testimony more specific objections under Rules 401 or 403. The decision of the Tenth Circuit accords the district court appropriate discretion to deal with such more particularized arguments when and if Sprint decides to make them.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

CIRCUIT COURT DECISIONS REGARDING DISCRIMINATORY CULTURE OR ATMOSPHERE

Abrams v. Lightolier, Inc., 50 F.3d 1204, 1214 (3rd Cir. 1995)

Antol v. Perry, 82 F. 3d 1291, 1301-02 (3d Cir. 1996)

Asmo v. Keane, Inc., 471 F. 3d 588, 595 (6th Cir. 2006)

Brennan v. GTE Government Systems Corp., 150 F. 3d 21, 28 (1st Cir. 1998)

Brewer v. Quaker State Oil Refining Corp., 72 F. 3d 326, 333 (3rd Cir. 1995)

Carey v. Mt. Desert Island Hospital, 156 F. 3d 31, 37 (1st Cir. 1998)

Conway v. Electro Switch Corp., 825 F. 2d 593, 597-98 (1st Cir. 1987)

Cummings v. Standard Register Co., 265 F. 3d 56, 63-64 (1st Cir. 2001)

Ercegovich v. Goodyear Tire & Rubber Co., 154 F. 3d 344, 355-56 (6th Cir. 1998)

Holsey v. Armour & Co., 743 F. 2d 199, 208 (4th Cir. 1984)

Josey v. John R. Hollingsworth Corp., 996 F. 2d 632, 641 (3d Cir. 1993)

Koster v. Trans World Airlines, Inc., 181 F. 3d 24, 34 (1st Cir. 1999)

Mandell v. County of Suffolk, 316 F. 3d 368, 378 (2d Cir. 2003)

Margolis v. Tektronix, Inc., 44 Fed. Appx. 138, 141 (9th Cir. 2002)

Mattenson v. Baxter Healthcare Corp., 438 F. 3d 763, 770 (7th Cir. 2006)

McNulty v. Citadel Broadcasting Co., 58 Fed. Appx. 556, 561-62 (3d Cir. 2003)

Parrish v. Immanuel Medical Center, 92 F.3d 727, 733 (8th Cir. 1996)

Pitre v. Western Elec. Co., Inc., 843 F. 2d 1262, 1267 (10th Cir. 1988)

Polanco v. City of Austin, Texas, 78 F. 3d 968, 980 (5th Cir. 1996)

Ratliff v. Governor's Highway Safety Program, 791 F. 2d 394, 402 (5th Cir. 1986)

Robinson v. Runyon, 149 F. 3d 507, 512-14 (6th Cir. 1998)

Ross v. Rhodes Furniture, Inc., 146 F. 3d 1286, 1291 (11th Cir. 1998)

Ryder v. Westinghouse Electric Corp., 128 F. 3d 128, 132 (3d Cir. 1997)

Ryther v. KARE 11, 108 F. 3d 832, 842 (8th Cir. 1997)(en banc)

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55-56 (1st Cir. 2000)

Slattery v. Swiss Reinsurance America Corp., 248 F. 3d 87, 92-93 (2d Cir. 2001)

Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106, 113 (1st Cir. 1979)

Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F. 3d 11, 18-19 (1st Cir. 2007)

Walden v. Georgia-Pacific, 126 F. 3d 506, 521-22 (3d Cir. 1997)

Warren v. Halstead Industries, Inc., 802 F. 2d 746, 753 (4th Cir. 1986)

Woodson v. Scott Paper Co., 109 F. 3d 913, 922 (3d Cir. 1997)

APPENDIX B

BUSINESS SCHOOL COURSE DESCRIPTIONS REFERRING TO CORPORATE OR ORGANIZATIONAL CULTURE

Carnegie Mellon Tepper School of Business: "Groups and Teams in Organizations"
http://public.tepper.cmu.edu/workingschedule/prospectivestudentworkingschedule.aspx

Emory University: "Leading People and Organizations"
http://www.goizueta.emory.edu/degree/fulltimemba/popups/Leading_People_and_Organizations.html

Harvard Business School: "Leadership and Organizational Behavior"
http://www.hbs.edu/mba/academics/term1.html

MIT Sloan School of Management: "Organizational Studies"
http://mitsloan.mit.edu/academic/courses/15.341.php

Northwestern University: "Leadership in Organizations"
http://www20.kellogg.northwestern.edu/dpco/offdtl.asp?course_id=MORS-430-0

Tuck School of Business, Dartmouth: "Organizational Culture and Culture Change"
http://oracle-www.dartmouth.edu/dart/groucho/tuck_mba_program.syllabus?p_id=OC

University of Michigan Ross School of Business: "Seminar in Organization Studies"
http://www.bus.umich.edu/CourseManagement/ViewCourseDescriptions.asp?Term=F07&Division=MO&Program=0

University of North Carolina Chapel Hill: "Leading Organizational Change"
http://www.kenan-flagler.unc.edu/Programs/MBA/Academics/electives.cfm

University of Southern California: "Behavior and Organizations"
http://www.usc.edu/dept/publications/cat2007/private/pdf/business.pdf (p. 47)

University of Washington: "Creating Effective Organizations"
http://bschool.washington.edu/emba/courses.shtml

Wharton School of Business: "Ethics and Responsibility" (Class 6)
http://www.aacsb.edu/resource_centers/EthicsEdu/Syllabi/lgst652010.pdf

Yale School of Management: "Organizational Perspectives (Employee)"
http://mba.yale.edu/MBA/curriculum/core/index.shtml